87-1465

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY FRANK PICCOLO,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in reviewing the sufficiency of a jury charge where there is a clear misstatement of the elements of the Mail Fraud Statute (18 USC 1341), as set forth in McNally v. United States, 107 S.Ct. 2875 (1987), the court may uphold a conviction based upon two isolated words.

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In the Supreme Court
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ANTHONY FRANK PICCOLO,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Anthony Piccolo, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 21, 1987.

DECISION BELOW

On December 21, 1987, the United States Court of Appeals for the Third Circuit

affirmed petitioner's conviction by a majority opinion of the two judges. A dissenting opinion was filed. (Both majority and dissent are reproduced as Appendix A to this petition). On February 2, 1988, the Third Circuit denied petitioner's request for a rehearing En Banc. (Reproduced as Appendix B to this petition).

GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction to review the December 21, 1987, judgment is conferred upon this Court by 28 USC §1254 (1).

QUESTION PRESENTED FOR REVIEW

WHETHER IN REVIEWING THE SUFFICIENCY OF A JURY CHARGE, AS TO THE ELEMENTS OF THE MAIL FRAUD STATUTE (18 USC 1341), THE COURT MAY UPHOLD A CONVICTION BASED UPON TWO ISOLATED WORDS. [WHEN THERE IS A CLEAR MISSTATEMENT], [AS SET FORTH IN MCNALLY V. UNITED STATES, 107 S.Ct. 2875 (1987).]

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision here involved is the Fifth Amendment to the United States Constitution, which reads in pertinent part as

follows:

> No person shall be...deprived of life, liberty, or property, without due process of law.....

United States Constitution, Amendment Five.

STATEMENT OF THE CASE

Anthony Piccolo was convicted by a jury of participating in a commercial kickback scheme which involved Mail Fraud (18 USC 1341 - Count II), Interstate Travel (18 USC 1952 - Count III), and conspiracy to commit each (18 USC 371 - Count I). The essence of each offense involved the activities of the chief government witness at trial, Timothy McCuen.

McCuen was a purchasing agent who provided confidential bid information to a third party thereby allowing an increase in bid price and resultant excess profit. He testified that Piccolo assisted him by providing a conduit for a portion of the excess profit to return to him.

After a lengthy and hotly contested trial, the jury, which deliberated for more than five

days, returned guilty verdicts against one co-defendant for all five counts and against Piccolo for three (Counts I, II, and III) of the five. A third co-defendant was acquitted of all charges.

During the charge to the jury, in discussing the nature of the mail fraud statute (as it related to both Count One, conspiracy and Count three, mail fraud), the trial court made it clear that the jury was permitted to convict the defendant if it found that the scheme was to defraud McCuen's employer of its intangible right to the honest and faithful services of its employee, Timothy McCuen.

ARGUMENT

WHETHER, IN REVIEWING THE SUFFICIENCY OF A JURY CHARGE WHERE THERE IS A CLEAR MISSTATMENT OF THE ELEMENTS OF THE MAIL FRAUD STATUTE (18 USC 1341) AS SET FORTH IN MCNALLY V. UNITED STATES, 107 S.Ct. 2875 (1987), THE COURT MAY UPHOLD A CONVICTION BASED UPON TWO ISOLATED WORDS.

The instructions given to the jury by the trial court included the following lan-

guage:

> One aspect of the mail fraud scheme charged in Counts three (3) through five (5), involves the defrauding of United Engineers of the honest and faithful services of its employee, Timothy McCuen. The mail fraud statute prohibits any plan or course of action intended to deceive others and to deprive them of their right of the honest and faithful services of certain individuals who are obligated to provide such honest and faithful services. (EMPHASIS ADDED).

A scheme to deprive an employer of its right to the honest and faithful service of its employee can constitute a crime under the mail fraud statute.

The right of any employer or other entity which engages a person to perform services to the faithful, honest and loyal, prudent services of that person is referred to as an intangible right. Unlike money or other items of property with physical characteristics, intangible rights cannot be touched, held, seen or otherwise seen by the senses. Hence, we refer to them as intangible.

The fact they are intangible, however, does not necessarily mean they are not valuable or they are not important. Under such circumstances, this right is said to incur on the part of an employee a fiduciary duty. The term fiduciary is derived from the Latin word meaning "trust."

You are instructed that if you find, beyond a reasonable doubt, that Timothy McCuen was an employee of United Engineers, that by virtue of his employment relationship and under Pennsylvania law, he was under a fiduciary duty or he was under a duty as an employee--we won't keep using the term fiduciary because it's not necessary in this case--he was under a duty as an employee to render his honest and faithful services to United Engineers.

Accordingly, McCuen was under a duty to act in United Engineers best interest and to disclose and reveal to United Engineers all information which he was aware that was material to the conduct of United Engineers' business, including the agreement to receive moneys in return for furnishing inside bid information.

Such information is material to the conduct of United Engineers' business if it would have been important for United Engineers to know in its decision making; if McCuen might reasonably have believed the information would have led United Engineers to reject Union Boiler's increased bid, or if McCuen might reasonably have contemplated potential economic harm to United Engineers stemming from the non-disclosure of the information.

Accordingly, you may find the existence of a scheme to defraud United Engineers of McCuen's honest and faithful services if

> you determine McCuen failed to disclose material information to United Engineers and the non-disclosure was capable of causing or actually did cause business harm to United Engineers.
>
> However, proof of actual monetary or economic loss by United Engineers is not necessary. It is the Government's contention the defendants aided and abetted McCuen in keeping any knowledge from United Engineers of the payment by Union Boiler or confidential bid information. The Government contends defendants obtained the payment from Union Boiler through the use of false purchase orders and invoices between Union Boiler and the various companies which they owned or controlled and in turn by paying McCuen through Liberty Associates.

This portion of the jury charge allowed the jury to convict Piccolo for conduct not within the proscription of the mail fraud statute, McNally v. United States, 107 S.Ct. 2875 (1987). It constituted plain error.

This case was argued before the Third Circuit on November 20, 1987. On December 21, 1987, the judgment was affirmed. A majority opinion and a dissenting opinion were filed. (See attached Appendix A).

The majority opinion of the panel correctly stated that "...the reviewing court must view the challenged instruction in the context of the overall charge rather than in "artificial isolation." Cupp v. Naughten, 414 U.S. 141, 147 (1973) citing Boyd v. U.S., 271 U.S. 104, 107 (1926), at page 4. Unfortunately, it then proceeded to do precisely what it correctly concluded was improper for the appellant to do. The majority viewed two instances where the jury charge seemed to require financial loss from the scheme to defraud as correcting the clearly erroneous language of the charge, supra. It was this "artificial isolation" that prompted Judge Aldisert to say in his dissent:

The trial court then made a comment that the government contends vitiated the incorrectness of misstatements:

> Accordingly, you may find the existence of a scheme to defraud United Engineers of McCuen's honest and faithful services if you deter-

mine McCuen failed to disclose material information to United Engineers and the nondisclosure was capable of causing or actually did cause business harm to United Engineers.

Id. at 607a-08a (emphasis added). The court earlier had charged that the government must prove beyond a reasonable doubt.

t]hat the defendant devised a scheme or artifice to defraud United Engineers of its right to the honest(,) faithful and loyal services of its employee. Timothy McCuen; and further, to defraud both United Engineers and Delmarva Power and Light Company of money.

Id. at 605a (emphasis added).

I have purposely emphasized the word "and"in these two isolated segments because it is the presence of these two monosyllabic conjunctions in jury instructions that extended 53 pages that the government insists cured the recited defects that ran counter to McNally teachings. I do not agree that such an incantation has the power to resurrect the fatality. The incorrect definitions of the mail fraud crime for the blot of ink in a glass of milk. And the blot cannot be removed by chanting the word "and" twice in a 10,000 word jury instruction). (Emphasis Added) at pp. 11-12.

The offending portion of the jury charge

so far overshadows the possibly curative language that a retrial on the mail fraud counts is dictated. It is impossible to be assured with any degree of certainty that this jury did not convict the defendant for conduct not proscribed by the mail fraud statute. Indeed, they were specifically told that certain conduct constituted a violation of that statute when United States v. McNally supra, has told us that the conduct is not a violation.

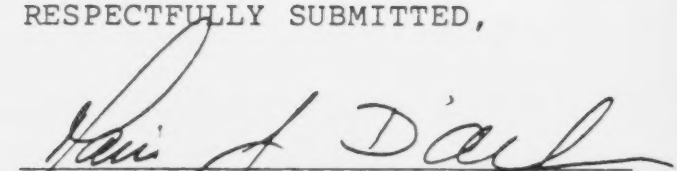
CONCLUSION

The issues raised in this petition are of substantial significance. They involve the application of the teachings in United States v. McNally, supra. Further, the method of applying the teaching of the Supreme Court while correctly stated, was violated in fact by the majority.

For the foregoing reasons, appellant, Anthony Piccolo, respectfully requests that a Writ of Certiorari issue from this Court

to the United States Court of Appeals for the Third Circuit.

DATED: RESPECTFULLY SUBMITTED,



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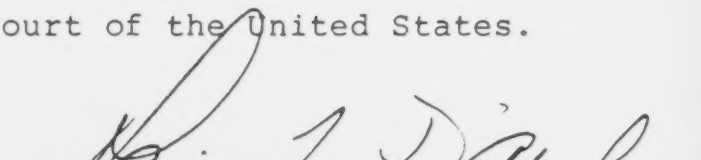
I hereby certify that I am duly admitted and qualified to practice as an attorney for the Supreme Court of the United States.



MARIO J. D'ALFONSO, ESQUIRE
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was served upon the United States of America by mailing first class postage, pre-paid, to Charles Fried, Acting Solicitor General, Room 5614, United States Department of Justice, Washington, D.C. 20530 on this 29 day of Feb. February, 1988.

MARIO J. D'ALFONSO
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5262

UNITED STATES OF AMERICA

v.

ANTHONY FRANK PICCOLO,

Appellant

Appeal from the United States District
Court for the District of New Jersey

D.C. Crim. No. 85-00345-03

Argued November 20, 1987

BEFORE:
SEITZ, HUTCHINSON and
ALDISERT, *Circuit Judges*.

Filed: December 21, 1987

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

Anthony Piccolo appeals a judgment of sentence. We have jurisdiction under 28 U.S.C. § 1291 (1982).

I. FACTS

Piccolo was a participant in a commercial kickback scheme, the essential aspects of which were as follows. Delmarva Power and Light Company ("Delmarva Power") contracted with United Engineers & Constructors, Inc., ("United Engineers") for construction services. Timothy McCuen was employed by United Engineers as a purchasing agent. United Engineers planned to award a subcontract for some of the work on the Delmarva Power project. One of the bidders for this subcontract was Union Boiler Company ("Union Boiler"). After initially bidding and finding that it was the low bidder, Union Boiler learned from McCuen that it could increase its bid significantly and still retain its status as low bidder. Union Boiler increased its bid by $303,000, received the contract, and divided the extra money with McCuen and other participants.

Piccolo's role in this criminal scheme was to launder some of the kickback money. Piccolo caused his company, Baron Maintenance Service, Inc., ("Baron Maintenance") to issue an invoice in the amount of $32,000 to Union Boiler for painting services that it never performed. Union Boiler then issued a $32,000 check to Baron Maintenance, and Baron Maintenance in turn issued a check for some part of that amount to McCuen through a corporation that McCuen had set up for the sole purpose of laundering kickback money. For his efforts, Piccolo kept part of the money.

Following a jury trial, Piccolo was convicted of one count each of violation of the Travel Act, 18 U.S.C. § 1952 (1982) ("Count II"), mail fraud, 18 U.S.C. § 1341 (1982) ("Count III"), and conspiracy to commit either of these two substantive offenses, 18 U.S.C. § 371 (1982) ("Count I"). He was sentenced to two years' imprisonment on Count I. In addition, he received a suspended sentence and a term of probation on Counts II and III. This appeal followed.

II. DISCUSSION

A. *Mail Fraud*

Piccolo's most substantial argument for the reversal of his conviction on Counts I and III is that the jury instructions given by the district court permitted the jury to convict Piccolo for conduct outside the proscription of the mail fraud statute. Specifically, Piccolo contends that the jury was permitted to convict him of mail fraud if it found that he participated in a scheme to defraud United Engineers of the company's intangible right to the honest and faithful services of its employee, McCuen, even if the object of wrongfully obtaining money or property was not part of the scheme. Relying on the Supreme Court's recent decision in *McNally v. United States*, 107 S. Ct. 2875 (1987), Piccolo argues that a conviction based on such instructions must be reversed.

In *McNally*, the Court held that the "mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 2879. Accordingly, the Court reversed McNally's conviction because the jury instructions at his trial permitted conviction for mail fraud based solely on a scheme to deprive the citizens of Kentucky of their intangible right to have state government conducted in an honest fashion.

Piccolo argues that the jury instructions at his trial were similarly flawed. He contends that his conviction must be reversed unless the instructions required the jury to find that the object of the scheme was to deprive another of money or property.

Because there was no timely objection to the jury instructions, our review is limited to an assessment of whether the instructions contained plain errors or defects affecting substantial rights. *See* Fed. R. Crim. P. 30, 52(b). We are satisfied that if, as Piccolo contends, the jury instructions allowed conviction for conduct outside the proscription of the mail fraud statute, such instructions would constitute both plain error and a defect affecting Piccolo's due process rights.

Piccolo bases his challenge to his conviction on one particular instruction rather than on the jury charge as a whole. The Supreme Court has noted that, when determining the effect of a single challenged instruction on the validity of a conviction, the reviewing court must view the challenged instruction in the context of the overall charge rather than in "artificial isolation."[1] *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)(citing *Boyd v. United States*, 271 U.S. 104, 107 (1926)). The Court further stated that

> a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several

---

1. It should also be noted that the district judge in this case instructed the jury to consider and apply each part of the instructions together with all of the other parts of the instructions.

components of the trial which may result in the judgment of conviction.

Id. We review the instructions given at Piccolo's trial in accordance with these guidelines.

In an initial summary of the offenses charged, the district court enumerated the allegations contained in the indictment. The court stated that the government alleged that the defendants "used and caused the mails to be used to further [a] scheme to defraud United Engineers and Delmarva Power and Light Company of money, and United Engineers of the honest and faithful services of Timothy McCuen."

Subsequently, in a detailed explanation of the nature of the offense of conspiracy, the district court referred to the alleged mail fraud scheme three times: 1) as a scheme to defraud United Engineers of its right to the honest and faithful services of its employee, Timothy McCuen, by paying him a bribe and to defraud United Engineers and Delmarva Power of $303,000; 2) as a scheme to defraud United Engineers and Delmarva Power; and 3) as a scheme to defraud United Engineers of its right to the honest, faithful and loyal services of its employee McCuen, and further to defraud both United Engineers and Delmarva Power of money. The plain meaning of these references would require the jury to find that an object of the scheme was to wrongfully obtain money or property before the jury could convict Piccolo of conspiracy to commit mail fraud.

With regard to the mail fraud count, the district court instructed the jury that there are three elements of mail fraud that the government must prove beyond a reasonable doubt in order to obtain a conviction. The first element of the statutory offense is that defendant devised a scheme to defraud or to wrongfully obtain money or property. Presumably to fulfill that

requirement, the court instructed the jury that the first element in Piccolo's case was "that the defendant devised a scheme or artifice to defraud United Engineers of its right to the honest, faithful and loyal services of its employee, Timothy McCuen, and further, to defraud both United Engineers and Delmarva Power and Light Company of money." A plain reading of this instruction fairly compels the conclusion that Piccolo could be convicted of mail fraud only if the jury found that he participated in a scheme to defraud United Engineers and Delmarva Power of money.

Shortly after she set forth the three elements of mail fraud, the district judge gave the instruction upon which Piccolo bases his challenge to his conviction. The district judge stated that

> One aspect of the mail fraud scheme charged in [Count] 3...involves the defrauding of United Engineers of the honest and faithful services of its employee Timothy McCuen. The mail fraud statute prohibits any plan or course of action intended to deceive others and to deprive them of their right of the honest and faithful services of certain individuals who are obligated to provide such honest and faithful services.
>
> A scheme to deprive an employer of its right to the honest and faithful services of its employee can constitute a crime under the mail fraud statute.
>
> The right of any employer or other entity which engages a person to perform services to the faithful, honest and loyal, prudent services of that person is referred to as an intangible right. ...
>
> The fact [that such rights] are intangibles, however, does not necessarily mean that they are not valuable or they are not important.

Piccolo argues that *McNally* requires the reversal of his conviction because this portion of the instructions

allowed the jury to convict him of mail fraud based solely on a finding that he participated in a scheme the sole purpose of which was to deprive United Engineers of its intangible right to the faithful services of McCuen.

Even if we assume that the above-quoted language was a misstatement of the law in the present context, we find that the jury could not, given the totality of the instructions, have convicted Piccolo unless it found that an object of the scheme in which he participated was to obtain money from Delmarva Power. In addition to consistently referring to the alleged scheme as one to, *inter alia*, defraud Delmarva Power of money, the district court clearly instructed the jury that, before it could convict Piccolo of mail fraud, it must find that the government proved beyond a reasonable doubt "that the defendant devised a scheme or artifice to defraud United Engineers of its right to the honest, faithful and loyal services of its employee, Timothy McCuen, *and further, to defraud both United Engineers and Delmarva Power and Light Company of money.*" Accordingly, we find no reversible error in the jury instructions given concerning mail fraud.

B. *Travel Act*

Piccolo contends that his conviction on Count II must be reversed because the district court erred by instructing the jury that it could find Piccolo guilty of violating the Travel Act if it found that the object of his interstate travel was commercial bribery in violation of Pennsylvania law. Because there was no timely objection to the jury instructions, our review is again limited to an assessment of whether the instructions contained plain errors or defects affecting substantial rights. *See* Fed. R. Crim. P. 30, 52(b). We are satisfied that if, as Piccolo contends, the jury instructions allowed conviction for conduct outside the proscription

of the Travel Act, such instructions would constitute both plain error and a defect affecting Piccolo's due process rights.

In light of *Perrin v. United States*, 444 U.S. 37, 50 (1979)("Congress intended 'bribery...in violation of the laws of the State in which committed' as used in the Travel Act to encompass conduct in violation of state commercial bribery statutes."), Piccolo's contention is devoid of merit.

C. *Evidentiary Matters*

Piccolo also raises a number of challenges to various evidentiary rulings made by the district court. We have reviewed these challenges and find that they either are without merit or do not rise to the level of reversible error.

III. CONCLUSION

In light of the foregoing, the judgment of sentence will be affirmed.

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ALDISERT, *Circuit Judge*, dissenting.

When Judge Thompson charged the jury in November 1986, the law appeared settled that proof of a scheme to deprive an employer, private or public, of its right to the honest and faithful services of its employee constituted a crime under the mail fraud statute. Thus, in the celebrated case involving the governor of Maryland, the Court of Appeals for the Fourth Circuit noted:

> At this late date, there can be no real contention that many schemes to defraud a state and its citizens of intangible rights, e.g., honest and faithful government, may not fall within the provision of the mail fraud statute.

United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979), *aff'd in relevant part*, 602 F.2d 653 (in banc), *cert. denied*, 445 U.S. 961 (1980).

But seven months after Judge Thompson delivered her charge, the Supreme Court delivered a blockbusting opinion in *McNally v. United States*, ___ U.S. ___ (55 U.S.L.W. 5011, 5013, June 24, 1987), flatly rejecting the notion that "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." Instead, the Court decided that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.*

It is against the *McNally* teachings that we must weigh the jury instructions here. And unfortunately, we must require the trial judge to have been a soothsayer and, contrary to ruling case law of this court, to have predicted something, to use Learned Hand's felicitous phrase, in the womb of time but whose date of birth was not imminent. The district judge charged the jury as follows:

> One aspect of the mail fraud scheme charged in Counts 3 through 5 involves the defrauding of United Engineers of the honest and faithful services of its employee Timothy McCuen. The mail fraud statute prohibits any plan or course of action intended to deceive others and to deprive them of their right of the honest and faithful services of certain individuals who are obligated to provide such honest and faithful services.

App. at 606a.

Whatever had been the ruling case law at the time of trial, this definition of the crime of mail fraud is now clearly wrong, according to the gospel of *McNally*. The judge continued:

> A scheme to deprive an employer of its right to the honest and faithful services of its employee can constitute a crime under the mail fraud statute.

Id. But "No, no," said the Court in *McNally*. The judge then stated:

> The right of any employer or other entity which engages a person to perform services to the faithful, honest and loyal, prudent services of that person is referred to as an intangible right. Unlike money or other items of property with physical characteristics, intangible rights cannot be touched, held, seen or otherwise seen by the senses. Hence, we refer to them as intangibles.
>
> The fact they are intangibles, however, does not necessarily mean they are not valuable or they are not important. Under such circumstances this right is said to incur on the part of an employee a fiduciary duty. The term fiduciary is derived from the Latin word meaning trust.

Id. But this is totally irrelevant to a prosecution under the mail fraud statute, said the Court in *McNally*. The instructions went further:

> You are instructed that if you find beyond a reasonable doubt that Timothy McCuen was an employee of United Engineers, that by virtue of his employment relationship and under Pennsylvania law . . . he was under a duty as an employee to render his honest and faithful services to United Engineers.

Id. 606-607. "So what does this have to do with the mail fraud statute?" poses the Court in *McNally*.

The trial court then made a comment that the government contends vitiated the incorrectness of the misstatements:

> Accordingly, you may find the existence of a scheme to defraud United Engineers of McCuen's honest and faithful services if you determine McCuen failed to disclose material information to United Engineers *and* the nondisclosure was capable of causing or actually did cause business harm to United Engineers.

Id. at 607a-08a (emphasis added). The Court earlier had charged that the government must prove beyond a reasonable doubt

> t]hat the defendant devised a scheme or artifice to defraud United Engineers of its right to the honest[,] faithful and loyal services of its employee, Timothy McCuen; *and* further, to defraud both United Engineers and Delmarva Power and Light Company of money.

Id. at 605a (emphasis added).

I have purposely emphasized the word "and" in these two isolated segments because it is the presence

of these two monosyllabic conjunctions in jury instructions that extended 53 pages that the government insists cured the recited defects that ran counter to *McNally* teachings. I do not agree that such an incantation has the power to resurrect the fatality. The incorrect definitions of the mail fraud crime form the blot of ink in a glass of milk. And the blot cannot be removed by chanting the word "and" twice in a 10,000-word jury instruction.

The appellant may be guilty of the crime of mail fraud. But that is not my task to decide. The executive branch of government has the duty to prosecute those who breach the rules of society. My job is to insure that society obeys its own rules in the prosecution process. It has not done so here.

Accordingly, I dissent and would reverse the mail fraud conviction and sentence, and remand for a new trial on the mail fraud counts only.

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A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5262

UNITED STATES OF AMERICA,

Appellant

vs.

ANTHONY FRANK PICCOLO
(D. C. Crim. No. 85-00345-03)

SUR PETITION FOR REHEARING

Present: SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ALDISERT, Circuit Judges.

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/Seitz
Circuit Judge

DATED: February 2, 1988

No. 87-1465

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY FRANK PICCOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SARA CRISCITELLI
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(202) 633-2217

QUESTION PRESENTED

Whether the jury instructions permitted petitioner's conviction for conduct that, under *McNally* v. *United States*, No. 86-234 (June 24, 1987), does not violate the federal mail fraud statute.

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Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1465

ANTHONY FRANK PICCOLO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 835 F.2d 517.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1987. A rehearing petition was denied on February 2, 1988 (Pet. App. 14a). The petition for a writ of certiorari was filed on March 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to commit mail fraud and to use interstate facilities in aid of commercial bribery, in violation of 18 U.S.C. 371; use of interstate facilities to facilitate com-

mercial bribery, in violation of 18 U.S.C. 1952; and mail fraud, in violation of 18 U.S.C. 1341.[1] Petitioner was sentenced to two years' imprisonment on the conspiracy count; two-year terms of imprisonment were imposed on the bribery and mail fraud counts, but were suspended in favor of five years' probation on each count. The court of appeals affirmed (Pet. App. 1a-13a).

The evidence at trial, which was summarized by the court of appeals (Pet. App. 2a) and is described more fully in the government's brief below (Gov't C.A. Br. 5-10), showed that petitioner participated in a commercial kickback scheme. After United Engineers & Constructors obtained a construction contract to perform repairs at an electric generating plant owned by Delmarva Power and Light Company, it awarded a subcontract to the Union Boiler Company. Union Boiler then learned through United Engineers' purchasing agent, Timothy McCuen, that it could increase its bid by $303,000 and still obtain the subcontract. Union Boiler did so and the $303,000 was divided among the participants in the scheme. Part of the kickback money was laundered through petitioner's company, and he received $8,829 for his services.

The district court's instructions to the jury focused on both tangible and intangible property interests. The instruction on the substantive mail fraud counts stated that the government had to prove beyond a reasonable doubt that petitioner "devised a scheme or artifice to defraud United Engineers of its right to the honest, faithful and loyal services of its employee, Timothy McCuen, and

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[1] Petitioner was acquitted on two mail fraud counts; co-defendant Gerald Profita was convicted on all five counts; and co-defendant Philip Vallese was acquitted on all counts.

further, to defraud both United Engineers and Delmarva Power and Light Company of money" (C.A. App. 605a).[2] With respect to the intangible rights allegation in the mail fraud counts, the court further instructed that "McCuen was under a duty to act in United Engineers best interest and to disclose and reveal to United Engineers all information [of] which he was aware that was material to the conduct of United Engineers' business[.] * * * * * [Y]ou may find the existence of a scheme to defraud United Engineers of McCuen's honest and faithful services if you determine McCuen failed to disclose material information to United Engineers and the non-disclosure was capable of causing or actually did cause business harm to United Engineers. However, proof of actual monetary or economic loss by United Engineers is not necessary." Pet. 6-7; see also Pet. App. 11a; C.A. App. 607a-608a. Petitioner did not object to the jury instructions.

On appeal, petitioner contended that the court's charge permitted conviction for conduct that did not constitute a federal crime in light of this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), which was decided about two months after petitioner was sentenced. A divided court of appeals affirmed the conviction (Pet. App. 1a-13a). Applying the plain error standard in view of petitioner's failure to object to the jury instructions at trial (*id.* at 4a), the court found from the context of the entire trial that "the jury could not, given the totality of the instructions, have convicted [petitioner] unless it found that an object of the scheme in which he participated was to

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[2] In explaining the conspiracy allegation, the court similarly charged that petitioner could be convicted of conspiring to commit mail fraud only if the government proved that he had conspired to deprive United Engineers of the honest services of its employee and to deprive the two companies of money (C.A. App. 589a-590a, 594a).

obtain money from Delmarva Power" (*id.* at 7a). The court noted that "[i]n addition to consistently referring to the alleged scheme as one to, *inter alia*, defraud Delmarva Power of money, the district court clearly instructed the jury that, before it could convict [petitioner] of mail fraud, it must find that the government proved beyond a reasonable doubt 'that [he] devised a scheme or artifice to defraud United Engineers of its right to the honest, faithful and loyal services of its employee, Timothy McCuen, *and further, to defraud both United Engineers and Delmarva Power and Light Company of money*' " (*ibid.* (emphasis in original)).

ARGUMENT

The court of appeals did not err. Petitioner must show that the jury instructions to which he did not object "undermined the fairness of the trial and contributed to a miscarriage of justice." *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985). When the instructions are considered as a whole and in the context of the entire trial, it is clear that no such error was committed here. Moreover, this case presents no important issue of law, but instead merely presents the question whether, under the facts of this case, the court of appeals correctly concluded that petitioner was not prejudiced by instructions given prior to this court's decision in *McNally*. Accordingly, further review is not warranted.

The Court explained in *McNally* that the mail fraud statute requires proof that the defendant devised a scheme to defraud someone of money or property. Looking to the jury instructions in that case, it reversed the convictions because "there was *nothing* in the jury charge that required" the jury to find a scheme to defraud anyone of property (slip op. 11 (emphasis added)). All that the jury

in *McNally* had to find to convict was that the State had been deprived of an "ethereal" interest in the honest and faithful service of an employee. See *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987), slip op. 6.

In *Carpenter*, the Court made clear that the property protected by the mail fraud statute includes intangible property, stating that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights" (slip op. 6). The Court went on to explain that " 'a person who acquires special knowledge or information by virtue of a * * * fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom' " (slip op. 8 (citation omitted)). Thus, where the jury instructions require a finding that an employer was deprived of a property interest, whether tangible or intangible, a mail fraud conviction is not invalid.

Under *McNally* and *Carpenter*, it appears that the intangible rights portion of the jury instructions was not erroneous. While the jury charge contained language that would not be included in instructions given today, the court plainly tied the deprivation of McCuen's honest services to United Engineers' property interests when it instructed that "you may find the existence of a scheme to defraud United Engineers of McCuen's honest and faithful services if you determine McCuen failed to disclose material information to United Engineers and the non-disclosure was capable of causing or actually did cause business harm to United Engineers" (Pet. 6; C.A. App. 607a-608a). There is nothing ethereal about that charge. Under it, the jury was instructed that the government had to show that United Engineers was defrauded of a property interest when McCuen devised a scheme to profit from its award of subcontracts, just as in *Carpenter*

the Wall Street Journal was defrauded of a property interest when the defendants traded on their knowledge of what the Journal would publish.

Moreover, the jury in this case was instructed that to convict petitioner it had to find that he devised a scheme to defraud United Engineers of both intangible rights *and* money. That the jury was charged that it had to find both objects of the fraud shows that it could not have convicted petitioner solely on an intangible rights theory. See *United States* v. *Perholtz*, 836 F.2d 554, 559 (D.C. Cir. 1988). Thus, even if the intangible rights portion of the charge was improper, no harm occurred since, under the instructions here, unlike the instructions in *McNally*, the jury had to conclude that petitioner participated in a scheme to obtain money.

In addition, since petitioner must show that a miscarriage of justice occurred because he did not object to the instructions at trial (*Young*, 470 U.S. at 17 n.14), the contested instruction must be read in the context of the evidence presented at trial. As the court of appeals concluded, given that the case was prosecuted under the theory that $303,000 was obtained through the fraudulent kickback scheme, "the jury could not * * * have convicted [petitioner] unless it found that an object of the scheme in which he participated was to obtain money" (Pet. App. 7a). See *United States* v. *Richerson*, 833 F.2d 1147, 1157 (5th Cir. 1987) (conviction upheld, despite a challenge under *McNally*, where "the overriding and predominant theory of the Government's case involved [the employer's] loss of money and property" through the scheme). It is implausible on the trial record of this case that the jury, which convicted petitioner of using interstate facilities to facilitate commercial bribery, would also have convicted petitioner for devising a mail fraud scheme that did not

result in a property loss to the victims of the scheme. Accordingly, no miscarriage of justice occurred and a new trial is not required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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